Supreme Court, U.S.
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APPENDIX FOR RESPONDENT

NO. 89-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner

v.

CLARENCE LEE BRANDLEY,
Respondent

On Petition for Writ of Certiorari To the Texas Court of Criminal Appeals

APPENDIX TO BRIEF IN OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

THIS IS A CAPITAL CASE

EXECUTION DATE MARCH 26, 1987

NO. 14,666

IN THE DISTRICT COURT OF
MONTGOMERY COUNTY, TEXAS
221st JUDICIAL DISTRICT

EX PARTE
CLARENCE LEE BRANDLEY,
PETITIONER

SECOND APPLICATION FOR
WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLARENCE LEE BRANDLEY, Petitioner in the above styled and numbered cause, by and through his attorneys of record, Mike DeGeurin and Paul Nugent, and files this Second Amended Application for Writ of Habeas Corpus, pursuant to Art. 11.07, Vernon's Annotated Code of Criminal Procedure, and in support of such Application shows:

I.

Petitioner is currently being held in confinement by James Lynaugh, Interim Director of the Texas Department of Corrections, at the Ellis Unit in Huntsville, Texas.

II.

Petitioner is confined pursuant to a conviction in Cause No. 14,666 from the 221st Court of Montgomery County, Texas which was issued on the 14th day of February,

1981. The jury assessed Petitioner the penalty of death. Copies of the docket sheet, indictment, judgment and sentence are attached hereto as Exhibits "A"; "B"; "C" and "D", respectively, and made a part hereof for all purposes.

III.

Petitioner appealed his conviction and death sentence to the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed Petitioner's conviction and sentence on May 8, 1985. The Opinion is reported at 691 S.W.2d 699 (Tex. Crim. App. 1985).

IV.

On December 4, 1985, Petitioner filed an Application for Writ of Habeas Corpus in the 221st Judicial District Court of Montgomery County, Texas. Petitioner filed an Amended Application for Writ of Habeas Corpus on July 3, 1986. Petitioner then orally amended his Amended Application for Writ of Habeas Corpus in open court on July 17, 1986.

V.

On July 17, 1986; July 18, 1986; and August 21, 1986, the Honorable Lynn Coker, Judge of the 9th District Court of Montgomery County, Texas, conducted an evidentiary hearing regarding Petitioner's Application. Without docketing the case for submission, the Court of Criminal Appeals denied Petitioner's Application on December 22, 1986.

VI.

Petitioner's previous Application did not contain the allegations now being presented to the Court.

VII.

Petitioner alleges that his confinement is unlawful for each of the following reasons:

1.) THE APPLICATION OF THE DEATH PENALTY TO THE PETITIONER IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN THAT THE PETITIONER IS INNOCENT.

Critical new evidence establishes Petitioner's innocence. Specifically, two janitors who witnessed the victim's abduction have come forward and given statements which establish that the Petitioner was in no way involved. These statements are recantations of the testimony given at Petitioner's second trial.

It is cruel and unusual punishment to execute an innocent man. The State maintains that the Court has no power, regardless of any new evidence proving the Petitioner's innocence, to prevent his execution. Petitioner submits that neither the Texas Constitution nor the United States Constitution permits the execution of an innocent man.

2.) PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL BECAUSE THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SYSTEMATICALLY CONDUCTED SECRET EX PARTE DISCUSSIONS REGARDING PETITIONER'S CASE.

Beginning with the commencement of Petitioner's second trial, and lasting until on or about March 5, 1982, the Honorable Trial Judge and the District Attorney

systematically conducted secret ex parte discussions regarding Petitioner's case. During the actual second trial itself, the Honorable Trial Judge and the District Attorney met secretly each morning, outside the presence of counsel for Petitioner, and discussed myriad aspects of Petitioner's trial. When counsel for Petitioner finally learned of the secret ex parte discussions between the Honorable Trial Judge and the District Attorney, counsel confronted the Honorable Trial Judge with such knowledge during an in chambers, non public, hearing on March 5, 1982. After the confrontation, the Honorable Trial Judge recused himself from Petitioner's case.

The secret ex parte discussions between the trial judge and the district attorney secured for the State of Texas an unfair advantage during Petitioner's second trial, denied Petitioner his right to an impartial trial judge, and denied Petitioner due process of law and a fundamentally fair trial.

3.) THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SECRETLY AGREED TO CONCEAL FROM DEFENSE COUNSEL THE FACT THAT EVIDENCE HAD BECOME "MISSING" WHILE IN THE CUSTODY OF THE STATE.

Sometime after the conclusion of Petitioner's second trial, an entire box of trial exhibits became "missing" while in the custody of the State. The missing evidence included the two caucasian hair samples found near the victim's vagina which belonged to two persons other than the Petitioner or the victim. Although the exact date that the evidence became missing is not now known, what is

certain is the fact that the Honorable Trial Judge and the District Attorney intentionally agreed not to reveal to defense counsel the fact that evidence was missing. The knowledge of the missing evidence was kept secret from defense counsel from approximately early January 1982 until March 12, 1982, when defense counsel were officially informed that critical trial evidence had been "lost" while in the possession of the State. During this two month period that the Honorable Trial Judge and the District Attorney secretly concealed from defense counsel that evidence was missing, the Honorable Trial Judge and the District Attorney engaged in secret ex parte discussions regarding the missing evidence. The State also attempted to substitute copies of trial documents for their originals in an attempt to secretly reconstruct the record, and thus permanently conceal from defense counsel the fact that critical trial evidence was destroyed. (It must be noted that defense counsel first became aware of the fact that evidence may be missing when defense counsel noticed that the exhibit numbers on some of the substituted documents did not match the original exhibit numbers assigned at trial. This suspicious circumstances, along with other confidential information, prompted defense counsel to confront the Honorable Trial Judge and the District Attorney regarding the possibility that trial evidence was missing. It was only after this confrontation that the Honorable Trial Judge recused himself from further involvement in the case and defense counsel were officially informed on March 12, 1982 that a box of trial evidence which included the critical pubic hair samples, was in fact missing.)

From March of 1982 until the present, counsel for Petitioner have continuously sought to have an evidentiary

hearing regarding the missing evidence. All requests for a hearing, however, have been summarily denied. Counsel for Petitioner do not accept the District Attorney's personal theory, untested in a public evidentiary hearing, that the entire box of trial exhibits, which contained critical evidence for the defense, was accidently thrown out on an unknown date by an unknown janitor or janitors. Counsel for Petitioner submit that the truth regarding the missing evidence will only be revealed when Petitioner is afforded a full and fair public evidentiary hearing.

The agreement between the Honorable Trial Judge and the District Attorney, not to reveal to defense counsel that evidence had become missing while in the possession of the State, denied Petitioner due process of law, and a fair and impartial post conviction process.

4.) DEFENDANT WAS DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW BY THE FACT THAT CRITICAL EVIDENCE HAVING THE POTENTIAL TO PROVE THAT THE PETITIONER IS INNOCENT WAS LOST AND DESTROYED WHILE IN THE EXCLUSIVE POSSESSION OF THE STATE.

The following critical evidence was in the exclusive possession of the State:

1.) THE COTTON SWABS;

Cotton swabs were used to take samples from the victim's vagina shortly after the rape and murder occurred. Semen and live spermatoza were present on the cotton swabs. Scientific analysis of the substances on the swabs could have proven the innocence of the Petitioner. The

cotton swabs were either intentionally or negligently destroyed by the State while in the exclusive possession of the State. They were destroyed before the Petitioner's attorney had an opportunity to have them analyzed.

2.) THE PUBIC HAIRS;

A reddish brown caucasian pubic hair and another brown body hair of probable caucasian origin were found near the victim's vagina. Scientific analysis performed by the Texas Department of Public Safety Crime Laboratory established that these two hairs were neither the Petitioner's nor the victim's. Sometime after the conclusion of the Peitioner's second trial, these hairs were "lost" by the State while in the exclusive possession of the State.

Because the two caucasian hairs found near the victim's vagina were "lost" by the State, the Petitioner is now deprived of an opportunity to prove his innocence by scientifically comparing the two hairs with the pubic hairs of the caucasian murder suspects who have recently surfaced. The loss or destruction of this critical evidence while entrusted to the State of Texas denies the Petitioner his fundamental right to present evidence to prove his innocence.

5.) THE PRETRIAL INVESTIGATIVE PROCEDURES UTILIZED BY THE STATE WERE SO IMPERMISSIBLY SUGGESTIVE OF THE PETITIONER THAT IT CREATED FALSE TESTIMONY CALCULATED TO MANUFACTURE CIRCUMSTANTIAL EVIDENCE AGAINST THE PETITIONER IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL.

CLARENCE BRANDLEY became the target of the investigation within hours of the murder when a Conroe police officer stated to Henry "Ickie" Peace and BRANDLEY:

> "One of you two is going to hang for this." The officer then turned towards BRANDLEY and said, "Since you're the Nigger, you're elected."

Once the State had selected Petitioner as the murderer, the State employed an impermissibly suggestive investigative procedure to make its case. Several days after the murder, the investigators took all of the white janitors who were present on the day of the murder and walked then together as a group through the school where the murder occurred. Consistent statements from the group were then developed which isolated the Petitioner in the area of the school where the murder had occurred during the time period that the murder was thought to have occurred. The statements that were obtained were false, but consistent with the State's initial theory that Petitioner was the murderer. At trial, the witnesses were coerced by threats of perjury to testify consistent with their pretrial false statements. This impermissably suggestive procedure is now demonstrated by the fact that two of the four janitors have recanted their trial testimony and admitted that it was false.

Because the "investigation" was designed not to solve the murder, but to convict the Petitioner, Petitioner's Constitutional rights to due process of law and a fundamentally fair trial were violated.

6.) TEXAS' DEATH PENALTY SYSTEM, AS APPLIED, DISCRIMINATES AGAINST BLACK DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner is a black person. The girl who was murdered was white. Petitioner is prepared to present statistical evidence which demonstrates that the Texas death penalty, as applied, discriminates against black persons. Two recent independent studies establish that whether a person is executed in Texas largely depends upon the race of the defendant and/or the race of the victim. The statistical analysis in these studies reveals that a person who kills a white person is five (5) to eight (8) times more likely to receive the death penalty then a person who kills a black person. The statistics establish that throughout the system—from initial criminal investigation through prosecutorial discretion in filing charges, jury selection and the trial itself—there is far greater public horror when the murder victim is white. In Texas, the probability of being executed s further significantly enhanced when a black person is charged with murdering a white person.

The issue of whether the death penalty is applied in a racially discriminatory manner is the idential issue on which the Supreme Court has granted certorari in *McCleskey v. Kemp, cert. granted,* U.S.____, 106 S.Ct. 3331, 92 L.Ed.2d 737 (July 7, 1986) and *Hitchcock v. Wainwright, cert. granted,* ____U.S.____, 106 S.Ct. 2888, 90 L.Ed.2d 976 (June 9, 1986). Both cases are currently pending before the United States Supreme Court.

The racially discriminatory manner in which the Texas death penalty is applied violates Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.

VIII.

Before the State is entitled to put Petitioner to death, Petitioner requests that this Court conduct an evidentiary hearing, pursuant to Article 11.07§2 (d) of the Texas Code of Criminal Procedure, to resolve all controverted, previously unreseolved facts which are material to the legality of Petitioner's confinement.

WHEREFORE, Petitioner prays the Court set this Application for a hearing and, after receiving evidence concerning all controverted and previously unresolved facts, issue a writ of habeas corpus, and enter an order recommending that Petitioner be discharged from further confinement pursuant to the illegal judgment and sentence in Cause No. 14,666.

Respectfully submitted,

FOREMAN & DeGEURIN

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State Bar No. 05637500

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THE STATE OF TEXAS §

COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority on this day personally appeared, Mike DeGeurin, who after being duly sworn stated:

"I am the attorney of record and the attorney in fact for Petitioner, CLARENCE BRANDLEY. I have authority by the Petitioner to sue out this writ. I have read the foregoing Application for Writ of Habeas Corpus and swear that all of the allegations of fact contained therein are true and correct to the best of our information and belief."

Mike DeGeurin

SIGNED AND SWORN to before me on this the 20th day of March, 1987.

Kathryn Arauza, Notary Public
Notary Public in and for
the State of Texas.
My Commission Expires: 3/89

EXHIBIT B

EX PARTE CLARENCE LEE BRANDLEY

WRIT NO. 9,691-03

Habeas Corpus Application

from MONTGOMERY County

O R D E R

This is an application for a writ of habeas corpus which was transmitted to this Court by the clerk of the trial court pursuant to the provisions of Article 11.07, V.A.C.C.P. *Ex parte Young,* 418 S.W.2d 824 (Tex. Cr. App. 1967).

The applicant was convicted of the offense of capital murder. The jury answered the special issues found in Article 37.071(b), V.A.C.C.P. in the affirmative and punishment was assessed at death. On direct appeal, the applicant's conviction was affirmed. Brandley v. State, 691 S.W.2d 699 (Tex. Cr. App. 1985).

In his present application, the applicant contends that he is innocent and thus the application of the death penalty constitutes cruel and unusual punishment, the trial judge and the district attorney engaged in ex parte communications regarding the applicant's case while it was in progress, he was denied due process of law by the judge and the district attorney secretly agreeing to conceal from his attorney the fact that some of the evidence was missing which missing evidence was crucial to his defense, thus denying him fundamental fairness, that the pretrial investigative procedures utilized by the State were so impermissibly suggestive that they created false and

misleading testimony, and that the Texas death penalty scheme, as applied, discriminates against black defendants in violation of the Constitution of the United States.

The trial court has failed to make findings of fact, simply ordering that the application "be transmitted to the Texas Court of Criminal Appeals for that Court to determine whether an evidentiary hearing should be conducted and upon which isues."

It is the Court's opinion that additional facts need to be developed and that the trial court is the appropriate forum. Therefore, the trial court is ordered to hold an evidentiary hearing to allow the applicant to more fully develop his allegations as set out above. The trial court should then make findings of fact as to each of the allegations set out in this order and also should make any further findings of fact and conclusions of law which it deems relevant and appropriate to the disposition of the applicant's application for habeas corpus relief.

Since this Court does not hear evidence, *Ex parte Rodriguez*, 169 Tex. Cr. R. 367, 334 S.W.2d 294 (Tex. Cr. App. 1960), this application for a post-conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order. The hearing ordered herein shall be held within 90 days of the date of this order.[1] A transcription of the court reporter's notes and the trial court's findings of fact shall be returned to this Court within 120 days of the date of this order.[2]

---

1. In the event any continuances are granted, copies of the order granting the continuance should be provided to this Court.

2. Any extensions of this time period should be obtained from this Court.

IT IS SO ORDERED THIS THE 30TH DAY OF JUNE, 1987.

PER CURIAM

En Banc

Do Not Publish

EXHIBIT C

WRIT NO. 9,691-03

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

EX PARTE
CLARENCE LEE BRANDLEY
PETITIONER

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

(Received November 19, 1987)

O R D E R

The Court afforded both Petitioner and The State of Texas a full and fair opportunity to present all evidence pertinent to Petitioner's Second Application for Writ of Habeas Corpus. After ten days of trial, in which the Court heard the testimony of 46 witnesses, in addition to various video taped and audio taped evidence, the Court became convinced that Clarence Lee Brandley did not receive a fair trial, was denied the most basic fundamental rights of due process of law, and did not commit the crime for which he now resides on death row. At the conclusion of the hearing, the Court accordingly rendered from the Bench as follows:

> "This is the 200th anniversary of our Constitution. One of the basic rights of this noble document is equal justice under the law and the inherent dignity of mankind.
>
> "The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion the pervasive shadow of darkness

has obscured the light of fundamental decency and human rights. I can only sadly state justice has been on trial here, but of more significance, injustice has been on trial.

"My statement of facts and conclusions of law to the Court of Criminal Appeals will be conclusive and unequivocable. I shall recommend a new trial for the defendant, and if granted, recommend the trial be removed from Montgomery County."

In accordance with the en banc Order entered by the Court of Criminal Appeals on June 30, 1987, the Court makes the following Findings of Fact:

I.

In his First Claim for Relief, Petitioner alleges:

THE APPLICATION OF THE DEATH PENALTY TO THE PETITIONER IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN THAT THE PETITIONER IS INNOCENT.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the court finds that credible and probative new evidence exists which establishes, by a preponderance of the evidence, that Petitioner is innocent of the crime for which he is now under the sentence of death.

The Court further finds that Petitioner has at all times exercised due diligence in an effort to discover the new evidence, and the fact that some of the new evidence was not discovered until shortly before Petitioner's execution

date on March 26, 1987, is in no way related to any lack of due diligence on Petitioner's part. To the contrary, the evidence was unavailable because of an atmosphere of fear, intimidation and racial prejudice, all of which were beyond the control of Petitioner.

Specifically, the Court finds:

1. John Henry Sessum testified at the evidentiary hearing. Sessum was a janitor at Conroe High School on the day that Cheryl Ferguson was raped and murdered. John Sessum and fellow janitors, Gary Acreman and Sam Martinez were waiting at the bottom of the hallway steps when the victim walked up the hallway from the direction of the gym. Gary Acreman commented that the victim was "good looking". Acreman then told the victim where the restroom was and followed the victim up the stairway, talking to her at the top of the landing. (It should be noted that at Clarence Brandley's first trial, Gary Acreman failed to mention that he had ever spoken to the girl; and, at Clarence Brandley's second trial, Gary Acreman specifically denied that he had ever spoken to the victim. Acreman also never informed the authorities in either of his two sworn statements that he had ever spoken to the victim. After John Sessum revealed that Acreman had in fact talked with the girl shortly before her death, Acreman admitted at the Evidentiary Hearing that had in fact talked to the girl. Acreman claimed that he had never before mentioned that he had talked to the girl, however, because it had completely "slipped his mind" until the Evidentiary Hearing.)

While Acreman was talking with the victim at the top of the stairs, John Sesum heard the girl say "No, No" a

couple of times and "Don't" and "Help". John Sessum then saw Gary Acreman grab the girl accompanied by a man whom Sessum later identified as James Dexter Robinson. Sessum could hear the girl for the next several minutes then her calls for help became quiet. Approximately 5 or 10 minutes after Acreman had grabbed the girl and disappeared with her, Clarence Brandley arrived on the scene and was told not to go into the restroom because there was a girl inside. Based on John Sessum's demeanor and his answers to questions on direct, cross-examination and the Courts own questioning, the Court finds that John Sessum is a credible witness and that his testimony was truthful.

2. Lorna Hubbell testified at the evidentiary hearing. Ms. Hubbell is now a 32 year old probation officer for Harris County, Texas. Ms. Hubbell had interviewed Gary Acreman in November of 1980, a few months after the rape and murder occurred at the high school. During her interview, Gary Acreman became extremely nervous when questioned about the events at the high school on the day of the murder. Acreman became so nervous during the interview that he was shaking violently, almost as if he were suffering from delirium tremens ("D.T.'s"). Acreman was very concerned about John Sessum and asked repeatedly throughout the interview: "What was John saying?", about the girl's murder. Ms. Hubbell was a credible witness. Her testimony was truthful and unrebutted.

3. The Petitioner introduced into evidence two video taped interviews of Gary Acreman in which Acreman wholly exonerates Brandley from any wrongdoing in connection with the rape and murder of Cheryl Fergeson. The Court finds that Gary Acreman freely and voluntarily gave the video taped statements and that he was in no way coerced or intimidated.

Gary Acreman testified at the evidentiary hearing. Acreman stated that on March 17, 1987, he visited Don Brown's office (one of Clarence Brandley's attorneys) to try to get in touch with Richard Reyna, an investigator for Brandley. Richard Reyna had earlier tried to contact Acreman at his home but Acreman wasn't in. Later in the day on March 17, 1987, Acreman telephoned Don Brown's office and again asked for Richard Reyna. When Don Brown informed Acreman that Richard Reyna wasn't in, Acreman told Don Brown that he was leaving for Corsicana, Texas. Don Brown suggested that Acreman could call for Richard Reyna once Acreman arrived in Corsicana.

When Acreman arrived in Corsicana, he again telephoned Don Brown's office and asked for Richard Reyna. Acreman then invited Richard Reyna to come to Corsicana so that they could talk. At or about 9:00 P.M. on March 17, 1987, Richard Reyna visited Acreman's motel room. Acreman's wife was also present. Richard Reyna and Acreman, along with James McClosky, another investigator for Petitioner, then went to the restaurant at the Holiday Inn. While at the restaurant, Acreman agreed to give a video tape interview.

In the video tape interview, Acreman admits that he did in fact talk with the victim as John Sessum had previously revealed. Acreman did not state, however, that he had followed the victim up the stairs as she proceeded towards the restroom. Nor did Acreman state that he had grabbed the girl and dragged her into the restroom. Instead, Acreman revealed on his video interview that it was James Dexter Robinson who had followed the girl up the stairs and grabbed her. After Robinson had grabbed the girl, she called "No!" and "Help!" as Robinson dragged her into the bathroom. Clarence Brandley was not present when Robinson grabbed the girl and dragged her into the bathroom. Brandley arrived on the scene a few minutes later. When Brandley arrived, Acreman told him not to go in the restroom because there was a girl in there. Acreman did not tell Brandley that the girl had been dragged into the restroom against her will. Based on the testimony of Acreman, James McCloskey and Richard Reyna, and their respective demeanors in court, the Court finds that Gary Acreman freely and voluntarily made the March 17, 1987 video taped interview, and that Acreman was in no way coerced or intimidated by anyone.

On March 20, 1987, Acreman permitted the videotaping of another interview. In the second interview, Acreman reiterates that James Dexter Robinson grabbed the victim and dragged her into the bathroom wholly outside of the presence of Clarence Brandley. Acreman additionally states that he saw James Dexter Robinson throw the victim's clothes in a dumpster behind the school. At the conclusion of the March 20, 1987 interview, Acreman was afforded the opportunity to add anything further if he so desired.

Based on the testimony of Gary Acreman, Richard Reyna and James McCloskey, and their respective demeanors in court, the Court finds that Gary Acreman freely and voluntarily—without coercion or intimidation —made his videotaped statement on March 20, 1987.

In addition to his statements of March 17, 1987 and March 20, 1987, the Court notes that Acreman had previously testified under oath, at an evidentiary hearing on July 17, 1986, that James Dexter Robinson was present at the high school the day Cheryl Fergeson was raped and murdered. The Court additionally notes that in a March 23, 1987 taped telephone conversation (introduced by the State) with Assistant District Attorney Rick Stover, Acreman again insisted that James Dexter Robinson was present at the high school on the morning of the murder and that Robinson threw clothes into the dumpster where the victim's clothes were eventually found.

Gary Acreman testified on two separate occasions at the evidentiary hearing. Although Acreman admitted that neither Richard Reyna nor Jim McCloskey threatened or coerced him in connection with the two video tape interviews, Acreman made the nebulous assertion that Reyna somehow mysteriously got him to say things he didn't intend to say. Acreman testified that John Sessum was telling the truth when Sessum revealed that Acreman had talked with the girl before she entered the restroom. Acreman stated that he had never before revealed that he had talked to the girl—either in his first sworn pretrial statement, his second sworn pretrial statement, his testimony at the first trial, his testimony at the second trial or in his testimony at the writ hearing in 1986—because "It completely slipped my mind."

Acreman testified that he did in fact tell his father-in-law, Ed Payne, that he had witnessed a person throw the girl's clothes into a dumpster on the day of the murder. Acreman further testified that he was not surprised when the police eventually found the victim's clothes in the dumpster on Monday, August 25, 1980, two days after the murder. Acreman maintained, however, that he did not tell his father-in-law about the clothes on the day of the murder, Saturday, August 23, 1980, as his father-in-law testified. Acreman instead claimed that he had told his father-in-law on Sunday, August 24, 1980, the day after the murder, that he had seen someone throw the girl's clothes into the dumpster.

Although Acreman's father-in-law, Ed Payne, testified that Acreman was acting very nervous and wanted to return to the school after he had told Payne about the girl's clothes being thrown in the dumpster, Acreman testified that it was Payne who wanted Acreman to return to the school. Acreman was unable to offer any explanation, however, why his father-in-law would have wanted him to return to the school.

Based on Gary Acreman's answers to questions and his countenance during the many hours that he was on the witness stand, the Court finds that his testimony at the evidentiary hearing was incredible, untruthful and generally not worthy of belief. The Court further finds that Acreman's testimony at the evidentiary hearing was wholly inconsistent with the credible testimony of eight other witnesses at the evidentiary hearing, to-wit: Lorna Hubbell; John Sessum; Edward Payne; John Payne; Georgia Cooper; Roger White; Connie Miller; and Kathy Binford, all of whom Acreman claimed were lying.

4. Edward Payne, Gary Acreman's father-in-law, testified at the evidentiary hearing. Edward Payne is 60 years old. Because of cancer, he could not speak through his mouth and testified only with the aid of a "voice box" that he held up to his throat. Payne stated that on the day of the murder, Saturday, August 23, 1980, Acreman came home from the high school and was acting very nervous, was "shaking real bad", and kept pacing back and forth. Gary Acreman appeared so completely shaken that Payne thought he was on the verge of a nervous breakdown. Acreman then told Payne that a girl had been killed at the high school and that he wanted to go back to the school and help find the girl's clothes. (The Conroe Police Department found the girl's clothes in a plastic bag located in the school dumpster on Monday, August 25th.)

Edward Payne additionally testified that he was beaten up by a relative of Acreman's after Payne decided to come forward and reveal what Acreman stated, and how Acreman acted, when he had returned home from the high school on the day of the murder.

(It should be noted, as previously stated, that Gary Acreman admitted at the evidentiary hearing that he did in fact tell his father-in-law, Edward Payne, that he had seen someone throw the girl's clothes in the dumpster. Acreman stated, however, that he had told his father-in-law on the Sunday following the murder, not the Saturday of the murder, as his father-in-law had testified. Acreman additionally testified that he was not surprised when the police eventually found the girl's clothes in the dumpster on Monday, August 25, 1980.)

On the following day, Sunday, Edward Payne told his brother and sister-in-law about what Acreman had said.

The Court finds that Edward Payne was a credible witness and that his testimony was truthful.

5. John Herman Payne, age 56, is the younger brother of Edward Payne. John Payne testified at the evidentiary hearing. On Sunday, August 24, 1980, the day after the girl's rape and murder at the high school, John Payne and his wife had visited Edward Payne. Edward Payne then told him and his wife that Gary Acreman had come home from the high school the day before and was real excited and was pacing up and down the driveway. Acreman wanted to borrow Edward Payne's car to go to the school to show the police where the girl's clothes were hidden.

The Court finds that John Herman Payne was a credible witness and that his testimony was truthful.

6. Georgia Cooper testified at the evidentiary hearing. She worked at the City Cab Company in Conroe at the time the girl was raped and murdered at the high school. Gary Acreman also worked at the cab company part time. Shortly after Clarence Brandley was arrested for the crime, Georgia Cooper and several other cab employees were talking about the murder at the office of the cab company. While the employees were talking about the murder, Gary Acreman interjected that Clarence Brandley did not commit the murder and that "he" (Acreman) knew who had done the murder but that he would never tell.

The Court finds that Georgia Cooper was a credible witness and that her testimony was truthful.

7. Roger White testified at the evidentiary hearing. White's grandmother and several friends worked at the City Cab Company in Conroe at the time of the rape and murder at the high school. A few days after Clarence Brandley was charged, White came to pick up his grandmother at the cab company. While White was at the cab company, he heard a woman named Connie Miller make a statement that she didn't believe that Clarence Brandley had committed the crime. After Ms. Miller made that statement, Gary Acreman stated that Clarence Brandley didn't do it and that he (Acreman) knew who did commit the crime.

The Court finds that Roger White was a credible witness and that his testimony was truthful.

8. Connie Jane Miller testified at the evidentiary hearing. She lived in Conroe, Texas when the rape and murder occurred at the high school. While Ms. Miller was at the office of the City Cab Company shortly after Clarence Brandley's arrest, a disheveled man came in and introduced himself as Gary Acreman, the new part time cab driver. When Ms. Miller stated to one of the other cab employees that she didn't believe Clarence Brandley had committed the murder, Gary Acreman jumped up from where he was sitting and exclaimed that Clarence Brandley didn't commit the murder and that he (Acreman) knew who did.

The Court finds that Connie Jane Miller was a credible witness and that her testimony was truthful.

9. Brenda Medina testified at the evidentiary hearing on July 17, 1986. At the time of the murder at the Conroe high school on August 23, 1980, she and James Dexter Robinson were living together. On the day of the murder, James Dexter Robinson came home after midnight, awakened Ms. Medina, and said that he had to leave the state because he had killed a girl. Robinson stated that he had hidden the girl's body well enough so that no one would find her until he was out of town.

When Robinson left town early that morning, he left behind his tennis shoes which had spots of blood on them.

Sometime in May of 1986, Brenda Medina first revealed to her attorney, W. B. Etheridge, the substance of Robinson's extra judicial confession on the evening of the murder. W. B. Etheridge, a 68 year old attorney with over 30 years of legal experience in Montgomery County, felt that Brenda Medina's information was very important and needed to be investigated. Accordingly, Etheridge immediately informed the District Attorney, Peter Speers. The Sunday night before the 1986 summer evidentiary hearing, Etheridge also informed Clarence Lee Brandley's attorney, Mike DeGeurin. Etheridge felt compelled to call DeGeurin when he learned that the District Attorney had never informed defense counsel of the extra-judicial confession of Robinson furnished by Brenda Medina. (The record reflects that after Etheridge informed District Attorney Peter Speers of the extra-judicial confession given to Brenda Medina, the District Attorney's Office proceeded to interview Brenda Medina and to tape said interview. The record further reflects, however, that the District Attorney failed to notify defense counsel of the newly discovered exculpatory evidence and in fact denied, in open court, that any exculpatory evidence existed.)

Although the Court did not have the opportunity to observe the countenance of Brenda Medina, her testimony is consistent with the other evidence received at the hearing.

10. James Dexter Robinson testified at the evidentiary hearing. Robinson admitted that he had in fact told Brenda Medina that he had killed a girl. Robinson claimed, however, that he told Brenda he had killed a girl during the time that he was working at the high school, sometime shortly before Cheryl Fergeson's murder. Robinson denied killing Cheryl Fergeson and claimed the alibi that he had left Conroe in the early morning hours on August 7, 1980 and moved to South Carolina. Although Robinson claimed that he was living in South Carolina on the day of the murder, August 23, 1980, five witnesses—Gary Acreman, John Sessum, Brenda Medina, Reginald Slacum and Debra Cheney—testified that they saw James Dexter Robinson in Conroe on the day of the murder, or a few days prior to the murder.

James Dexter Robinson's sister, Debbie Ann Clardy, was flown in from South Carolina to testify at the evidentiary hearing. Ms. Clardy testified that she remembered seeing James Dexter Robinson at a birthday party in South Carolina one week before Cheryl Fergeson's murder. Ms. Clardy returned home after the birthday party, however, and could not say whether Robinson stayed in South Carolina or returned to Conroe before the murder.

James Dexter Robinson's uncle, Odis Salters, was also flown in from South Carolina to testify at the evidentiary hearing. Salters claimed that Robinson was in South Carolina during the week following the birthday party and the week preceding Cheryl Fergeson's murder because Salters remembers that he and Robinson worked different shifts at the same plant. Robinson admitted, however, that he had not begun working in South Carolina until sometime in September of 1980, several weeks after the murder.

The Court finds that James Dexter Robinson was not a credible witness and that his testimony was not worthy of belief.

The Court further finds that the testimony of Robinson's sister and uncle was inconsistent with other credible evidence and of little probative value.

11. Debra Cheney testified at the evidentiary hearing. She had lived in Conroe on the date of the murder and was a next door neighbor of Brenda Medina and James Dexter Robinson. Debra Cheney saw James Dexter Robinson in Conroe three days before the murder, on Wednesday, August 20, 1980, when James Robinson came to the City Health Clinic with Brenda Medina.

The Court finds that Debra Cheney was a credible witness and that her testimony was truthful.

12. Reginald T. Slacum, Jr. testified at the evidentiary hearing on August 21, 1986. During the summer of 1980, Slacum was employed as a janitor at the Conroe high school. Slacum saw James Dexter Robinson in Conroe on August 20, 1980, three days before the murder. August 20th was a payday, and Robinson had come to Slacum's home to collect an Amway debt. Robinson shoved Slacum while trying to collect the money. Slacum recalls that the date was August 20, 1980 because after Robinson's visit, Slacum went to the hospital emergency room and thereafter missed two weeks of work.

Although the Court did not have an opportunity to observe the countenance of Reginald Slacum, his testimony is consistent with the other evidence received at the hearing.

13. Kathy Binford testified at the evidentiary hearing. In 1979, she was employed as a crew chief for Organic Lab, Inc. From May, 1979 through July, 1979, Gary Acreman was employed as a truck driver on Ms. Binford's crew. Gary Acreman was fired in July of 1979 after she witnessed Acreman sexually assault a female co-worker in the stock room. Ms. Binford additionally testified that other female workers at the company had complained about Acreman's sexual advances.

It should be noted that Acreman testified, without any documents or corroborating testimony of any nature, that he had been fired from Organic Lab, Inc. because of a vehicular accident, not because of the sexual assault.

The Court finds that Kathy Binford was a credible witness and that her testimony was truthful. The Court finds that Gary Acreman was not truthful when he testified that he was fired by Organic Lab, Inc. because of a vehicular accident.

14. Cheryl Bradford, age 24, a coach at Langhum Creek High School, testified at the Evidentiary Hearing. Ms. Bradford had been a volleyball player for Waller High School in 1980 and was present at Conroe High School on the day of Cheryl Fergeson's murder. Ms. Bradford knew Ceryl Fergeson and saw her as they passed in the hallway. As they passed, Ms. Bradford was returning from the restrooms to the gym and Cheryl Fergeson was headed in the direction of the restrooms from the gym area. Ms. Bradford returned to the gym after she had passed Cheryl Fergeson in the hall. Approximately 20 to 30 minutes later, Ms. Bradford noticed two white males walk quickly across the top of the bleachers in the gym and then exit a door to the outside of the school. The general description of the two men matched the general discription of Gary Acreman and James Dexter Robinson.

When Ms. Bradford returned home on the afternoon of the murder, she told her volleyball coach, Sylvia Ash, that she had some important information that the police should know about regarding Cheryl Fergeson's murder. Ms. Bradford and her coach then called the Conroe Police Department. Ms. Bradford testified that the police were not real interested in her information and were in a rush to get her off the phone. After Ms. Bradford reported her information regarding the two white men, neither the Conroe police, Texas Ranger Wesley Styles, nor any other agency, ever called her back or personally visited her to discuss her inforation.

While Ms. Bradford was watching the "60 Minutes" program during the spring of 1987, she got "chills" when she saw the photograph of James Dexter Robinson shown on the television. Ms. Bradford thereafter contacted the authorities to again report the information that she had seen two white males hurriedly pass through the gym and exit outside approximately 20 to 30 minutes after Cheryl Fergeson had left the gym on the way towards the restroom. No explanation was given why the State never pursued this information nor why it was never disclosed to defense counsel.

The Court finds that Cheryl Bradford was a credible witness and that her testimony was truthful.

15. Both Gary Acreman and James Dexter Robinson have Type A blood. Type A blood was found on the clothing of the victim. Petitioner has Type O blood. The Court notes that it was only in April of 1987, when the Attorney General's Office began their investigation, that it became known that both Gary Acreman and James Dexter Robinson had Type A blood. Prior to the Attorney General's investigation, the Montgomery County District Attorney's Office had successfully resisted the efforts by defense counsel to obtain blood samples from possible suspects who were present at the school on the date of the murder.

II.

In his Second Claim for Relief, Petitioner alleges:

> PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL BECAUSE THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SYSTEMATICALLY CONDUCTED SECRET EX PARTE DISCUSSIONS REGARDING PETITIONER'S CASE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the trial judge and the district attorney conducted ex parte discussion regarding Petitioner's case and that said discussions denied Petitioner due process of law and a fundamentally fair trial. Specifically, the Court makes the following Findings of Fact:

1. The trial judge and the district attorney conducted ex parte meetings in the mornings prior to trial of Petitioner's case. These meetings were outside the presence of defense counsel and were conducted without notice to, and without the knowledge of, defense counsel. Counsel for Petitioner did not become aware of the ex parte meetings between the judge and the district attorney until after the conclusion of Petitioner's trial and after the time allowed to file a motion for new trial.

The Court finds that the testimony of Janet Dial, Judge Martin's secretary during the Brandley trial, that District Attorney Keeshan and Judge Martin met in Judge Martin's

chambers in the mornings prior to trial, is credible and truthful and was not rebutted by credible evidence. The Court further finds that Judge Martin's absolute denial of any ex parte meetings is not credible.

2. The district attorney and the trial judge resolved significant issues regarding Petitioner's case without first giving notice to defense counsel, and wholly outside the presence of defense counsel.

3. The issue regarding Petitioner's bond was decided by the trial judge and the district attorney without any notice to defense counsel and without defense counsel being present. When Petitioner's attorney sought to post the $30,000.00 surety bond that had been set, the Montgomery County Sheriff, Gene Reaves, refused to accept the bond and release Petitioner. In refusing to accept the bond, Sheriff Reaves had no legal justification. He simply stated that he didn't want "the little nigger to hit the street." District Attorney James Keeshan agreed, also stating that he didn't want the "little nigger" on the street. The Judge ordered the Sheriff to accept the bond.

When Petitioner's attorneys returned the following day to again attempt to post the $30,000.00 bond and secure the Petitioner's release, the attorneys were served by the District Attorney's Office with a Motion to Increase Bond. Attached to the Motion to Increase Bond was an Order which had already been signed ex parte by the Judge. The Order raised Petitioner's bond to $70,000.00.

The Court notes that the Record of Petitioner's trial corroborates the testimony that Judge Alworth raised Petitioner's bond upon an ex parte motion by District Attorney Keeshan without notice to defense counsel.

4. The District Attorney and the trial judge conducted ex-parte meetings regarding the trial exhibits which had become missing. (It was the District Attorney's intention that Petitioner's attorneys never be informed that an entire box of trial exhibits had disappeared. In order to facilitate the cover-up, the district attorney attempted to secretly re-construct the record with fake exhibits). Once Petitioner's attorneys learned that there was an apparent problem regarding the trial exhibits, counsel set a hearing to determine the status of the record. The day before the scheduled hearing, Judge John Martin met with district attorney James Keeshan after hours in the district attorney's office. Defense counsel were not invited. At the meeting it was decided that the district attorney should be allowed to speak out of turn at the hearing and the judge would then rule that the defense could not call any witnesses in an effort to determine what happened to the missing exhibits. The district attorney and the trial judge met secretly at least two other times concerning the missing exhibits.

III.

In his Third Claim for Relief, Petitioner alleges:

> THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SECRETLY AGREED TO CONCEAL FROM DEFENSE COUNSEL THE FACT THAT EVIDENCE HAD BECOME "MISSING" WHILE IN THE CUSTODY OF THE STATE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the

Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the trial judge and the district attorney secretly agreed to conceal from defense counsel the fact that trial exhibits had become missing, thereby denying Petitioner due process of law. Specifically, the Court makes the following Findings of Fact:

1. Sometime in early January, 1982, an entire box of trial exhibits became missing. The box of exhibits had been in the possession of Judge John Martin's court reporter, Mary Johnson. The contents of the box included Henry "Icky" Peace's gun, the victim's clothing which contained spots of blood, several knives, various trial documents, and glass slides which contained the four (4) hairs found near the victim's vagina. One of the four hairs was a *Caucasian* pubic hair which belongs to neither the victim nor her boyfriend. At the time the caucasion pubic hair became missing, the district attorney had successfully prevented all efforts by the defense attorneys to have a pubic hair sample obtained from Gary Acreman so that Acreman's pubic hair could have been compared to the Caucasian pubic hair found near the victim's vagina.

2. Judge Martin's court reporter, Mary Johnson, immediately informed the Judge when it became known that the exhibits had become missing. The Judge then immediately informed the district attorney. The District Clerk, Peggy Stevens, was also immediately informed. Neither the Judge, the District Attorney nor the District Clerk informed defense counsel. Both District Attorney Keeshan and Judge Martin instructed Mary Johnson that the defense attorneys should not be told about the missing exhibits because they would "just make a big deal about it."

3. It was the intention of District Attorney Keeshan that defense counsel never learn that important trial exhibits had become missing. Keeshan accordingly attempted to secretly reconstruct the record with fake, altered exhibits. While the district attorney was in the process of attempting to cover up the missing evidence and conceal the fact from defense counsel, the District Clerk, Peggy Stevens, would stall and divert inquiries about the original record. The district clerk would also warn the district attorney. When defense counsel Don Brown asked Peggy Stevens about the original exhibits, and then informed Peggy Stevens that he was going to go and personally inquire with the district attorney, Peggy Stevens hurried to the district attorney's office to warn Keeshan. The district clerk and the district attorney then hid together in the district attorney's office while the district attorney's secretary diverted the attorney who had come to ask about the trial exhibits. District Clerk Stevens thought the incident was funny, and laughed when she came to Judge Martin's chambers to report how she and District Attorney Keeshan had fooled defense counsel about the missing exhibits by hiding together in the District Attorney's office.

The Court finds that the District Clerk Peggy Stevens was not a credible witness and that her testimony was not truthful.

4. Although both Judge Martin and District Attorney Keeshan had designed to keep secret the fact that the trial exhibits had become missing, the defense attorneys eventually became aware after several different individuals felt an ethical duty to come forward and release the secret. Frank Robin, an assistant district attorney who worked for James Keeshan, eventually informed defense counsel that critical trial exhibits had become missing. Although District Attorney Keeshan had instructed Robin not to tell anyone, Robin felt an ethical obligation to disclose the secret to defense counsel. The Court finds that Frank Robin was a credible witness and that his testimony was truthful.

Mary Johnson, Judge Martin's court reporter, had been asked to be part of the cover-up regarding the missing evidence. She eventually felt an ethical obligation to inform defense counsel of the cover-up. Mary Johnson was afraid to personally call defense counsel and inform them, however, so she was assisted by Judge Martin's secretary, Janet Dial. Because of her fear of the judge and the district attorney, Mary Johnson requested that defense counsel never mention her name in connection with who released the secret regarding the missing exhibits and the cover-up conspiracy. Accordingly, from 1982 until the evidentiary hearing, Janet Dial has been silently shouldering the blame in Montgomery County for informing defense counsel about the conspiracy to cover-up the fact evidence had become missing. (It should be noted that Mary Johnson attended an ex parte meeting between

Judge Martin and District Attorney Keeshan where the two decided that defense counsel Don Brown would not be allowed to have a hearing regarding the missing exhibits. When Don Brown presented Judge Martin with a recusal motion at the hearing held the next day, based on the ex parte meetings Judge Martin had been conducting with the district attorney, Mary Johnson felt she would be fired by Judge Martin and thought she actually had been fired after the meeting. Mary Johnson later learned that she had not been fired and that Judge Martin and District Attorney Keeshan were under the mistaken impression that Janet Dial, not Mary Johnson, had informed defense counsel of the cover-up.) Janet Dial resigned in June, 1981.

5. The record will reflect that on March 12, 1982, two months after the trial judge and the district attorney learned that trial exhibits had become missing, defense counsel were officially informed of the missing evidence. The record will also reflect that defense counsel were at that time denied the opportunity to call witnesses in an effort to make a record regarding the circumstances of the missing evidence. In officially informing defense counsel, the court pronounced, as learned from the district attorney, that an unnamed janitor or janitors had unintentionally thrown out the box of exhibits on an unspecified date.

6. Mary Johnson testified at the evidentiary hearing that she did not believe the story floated at the courthouse that some janitors had accidentally thrown out the exhibits. She testified that the custodial staff at the courthouse had instructions not to enter or clean her office, and were not supposed to have keys to her office. Mary Johnson further testified that the box of exhibits—which included a gun, several knives, and the victim's clothes—in no way resembled a box of trash which could have been accidentally thrown out.

The Court finds that Mary Johnson was in all respects a credible witness and that her testimony was truthful.

7. Then District Attorney Keeshan, now Judge Keeshan, testified at the evidentiary hearing that he had become "somewhat satisfied" that the janitors had played a role in the missing exhibits. Neither Judge Keeshan, nor any other witness, however, revealed the name or names of any janitors who were supposedly suspected of having thrown out the exhibits, or who were interviewed in connection with any investigation of the incident.

8. Defense attorneys were denied any input in determining if the trial exhibits were actually missing. Defense attorneys were also denied the opportunity to participate in locating the exhibits, if the exhibits are in fact missing.

IV.

In his Fourth Claim for Relief, Petitioner alleges:

> PETITIONER WAS DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW BY THE FACT THAT CRITICAL EVIDENCE HAVING THE POTENTIAL TO PROVE THAT THE PETITIONER IS INNOCENT WAS LOST AND DESTROYED WHILE IN THE EXCLUSIVE POSSESSION OF THE STATE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that critical evidence, having the potential to prove the Petitioner's innocence, was lost or destroyed while in the exclusive possession of the State, thereby denying Petitioner fundamental fairness and due process of law. Specifically, the Court makes the following Findings of Fact:

1. An autopsy was performed on the victim, Cheryl Fergeson. As part of the autopsy, cotton swabs were used to take fluid samples from the victim's vagina. The swabs tested positive for spermatoza. No tests were performed, however, to establish the blood grouping of the donor of the spermatoza. No records exist as to when the swabs were disposed of or who disposed of them. The record reveals, however, that the swabs were not available when requested by defense counsel shortly after the murder and prior to the first trial.

2. Detective Ralph Yarbrough, a Sargeant in the Sex Crimes Unit of the Homicide Division of the Houston Police Department, testified at the evidentiary hearing. Detective Yarbrough is an expert in the field of sex crime investigations and has participated in the investigation of over 1000 rape cases. The cotton swabs from a victim's vagina have critical evidentiary value in a rape investigation--particularly in a capital case. Tests performed on the swabs can determine the bloodtype, R H factor and other genetic characterizations of the donor of the spermatoza. Through such tests, suspects can be scientifically excluded as the perpetrator of the rape homicide. It is standard police procedure, both in 1980 and today, to preserve the vaginal swabs for comparison with all potential and future suspects. There is no scientific justification to discard the vaginal swabs taken from the rape victim.

3. Five janitors were working at Conroe High School on the day of the murder. Clarence Brandley, the head janitor and supervisor, was the only black man. A blood sample was taken from Clarence Brandley after the murder, but no samples were taken from Gary Acreman or the other persons present when the victim approached the restroom.

Even after the new evidence was discovered this past year, neither the Montgomery County District Attorney's office nor any law enforcement agency in Montgomery County obtained a blood sample from Gary Acreman or James Dexter Robinson. It was only after the Attorney General's Office entered the investigation in the spring of 1987 that blood samples were finally obtained from Gary Acreman and James Dexter Robinson. Gary Acre-

man has type A blood. James Dexter Robinson has type A blood. The blood found on the blouse of the victim was also determined to be type A blood. Clarence Brandley has type O blood. Had the vaginal swabs been tested to determine the blood type of the donor of the spermatoza, Clarence Brandley could have been scientifically excluded as a suspect.

4. In Petitioner's circumstantial evidence case, it would have been important for the jury to have learned that another janitor had the same type blood that had been found on the victim's clothes.

5. The court heard testimony at the evidentiary hearing that a cotton swab taken from a rape victim was analyzed by the F.B.I. after the swab had been left for 12 years on the shelf of the Elizabeth New Jersey Police Department's Porperty Room, in a paper envelope and in an unrefrigerated state. The F.B.I. analysis of the 12 year old swab revealed that the donor of the spermatoza, found in the rape victim's vagina, had a different blood type than the man who had been convicted and sent to prison for life. Because the analysis of the swab scientifically established the innocence of the man wrongly convicted, the Federal District Court in New Jersey granted the man a new trial.

6. Four hairs were found near the victim's vagina. One of the hairs was a caucasion pubic hair which was neither the victim's nor her boyfriend's. Despite the fact that a caucasion pubic hair was discovered near the victim's vagina, District Attorney Keeshan refused to take hair samples from Gary Acreman and the other two white janitors who were present when the victim was dragged into the restroom and murdered. District Attorney Keeshan

also resisted all efforts made by defense counsel to have hair samples removed from Gary Acreman and the other two janitors. Keeshan testified at the evidentiary hearing that he resisted the defense attempt to have Gary Acreman and the others provide hair samples because it would have been a "needless imposition."

7. The testimony at the evidentiary hearing unequivocally establishes that Gary Acreman and James Dexter Robinson are prime suspects and probably were responsible for the death of Cheryl Lee Fergeson. Because the caucasion pubic hairs, and the other nonnegroid hairs found near the victim's vagina, had disappeared sometime in January of 1982, Clarence Lee Brandley is now denied the opportunity to have the hair of Gary Acreman and James Dexter Robinson scientifically compared to the four hairs found on the victim.

V.

In his Fifth Claim for Relief, Petitioner alleges:

> THE PRETRIAL INVESTIGATIVE PROCEDURES UTILIZED BY THE STATE WERE SO IMPERMISSIBLY SUGGESTIVE OF THE PETITIONER THAT IT CREATED FALSE TESTIMONY CALCULATED TO MANUFACTURE CIRCUMSTANTIAL EVIDENCE AGAINST THE PETITIONER IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Peti-

tioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the pretrial investigative procedures utilized by the State were so impermissibly suggestive that false testimony was created, thereby denying Petitioner due process of law and a fundamentally fair trial. Specifically, the Court makes the following Findings of Fact:

1. Petitioner's conviction was based entirely on circumstantial evidence: there were no eye witnesses, no scientific evidence of any significant probative value, and no confession.

2. The primary evidence against Petitioner was the circumstantial testimonial evidence given by the other janitors who were present at the high school on the day of the murder.

The murder occurred at Conroe high school on Saturday, August 23, 1980. Classes were scheduled to resume in less than ten days. Testimony at the evidentiary hearing established that the authorities had announced to the public that they would have a suspect arrested prior to the start of class. District Attorney Keeshan requested the assistance of Texas Ranger Wesley Styles. Ranger Styles began his investigation the evening of Thursday, August 28, 1980. The next day, before first interviewing any witnesses, Ranger Wesley Styles arrested Petitioner, Clarence Lee Brandley.

The arrest occurred on the Friday before school was scheduled to start. On Saturday, August 30, 1980, Ranger Styles had janitors Gary Acreman, Sam Martinez and John Sessum come to the high school. Ranger Styles then conducted a "walk through" whereby the janitors, in the presence of each other, were given the opportunity to tell Styles what had happened on the day of the murder. Of the three janitors present, Gary Acreman did most of the talking at the "walk through". District Attorney Keeshan was not present. Charlie Ray, an investigator for the District Attorney's Office, was present for the walk through, although Ray did not testify at the evidentiary hearing.

After the "walk through", Gary Acreman, Sam Martinez and John Sessum were all consistent as to the critical sequence of events and the critical time frames. Ranger Styles did not take written statements from the janitors prior to the walk through. Styles instead waited to take statements until Acreman, Martinez and Sessum had been walked through the school together and questioned in each others presence. Although Ranger Styles had conducted the "walk through" with Acreman, Martinez and Sessum, Styles did not supervise the taking of the janitors' sworn statements immediately following the "walk through". Ranger Styles testified that he has no idea whether the sworn statements are acurate. Ranger Styles was suprised, and could offer no explanation, why John Sessum's post "walk through" statement was not signed until September 30, 1980—one month after the walk through.

4. Henry "Ickie" Peace testified at the Evidentiary Hearing. Peace was the key witness for the State at Petitioner's trial. Peace testified that he cannot read or write and that the police wrote his pre-trial statement. After the police had written the statement, Peace asked if his sister or brother could read the statement to him. The police refused. Peace then signed the statement, stating at the Evidentiary Hearing, "I have no idea what was on my statement." Peace further testified that the police made him initial an additional piece of paper, claiming they had made a mistake. Peace had no idea what changes the authorities made.

Shortly after the murder, Texas Ranger Wesley Styles appeared at Peace's house sometime after dark. Ranger Styles then transported Peace to the Cleveland, Texas Police Station and kept him there until approximately 1:30 in the morning. While in the car, Styles threatened to blow Peace's brains out. Ranger Styles then roughed Peace up and threatened him at the station. At one point, Styles grabbed Peace by a chain he wore around his neck, twisted the chain and then shoved him up against the wall while choking Peace with the chain. The Court notes that Peace is a very small man, perhaps less than five feet tall. Ranger Wesley Styles is a large man, over six feet tall and well built.

Peace testified that he was afraid of Ranger Styles when Styles interrogated him in 1980. Peace further testified that he is still afraid of Styles today. Peace committed perjury at Petitioner's trial.

Peace complained to the District Attorney's Office about Styles roughing him up and threatening him. The District Attorney's Office told Peace that he was "hallucinating" and "imagining things" and that he couldn't prove it anyway because it would be his word against the Ranger's. The District Attorney never disclosed the *Brady* material to defense counsel.

5. John Sessum testified at the Evidentiary Hearing that he was intimidated by Texas Ranger Wesley Styles and was afraid to tell Styles the truth. At one point during the "walk through" conducted by Styles, Styles threatened to arrest Sessum if Sessum didn't cooperate. Sessum testified that he is still afraid of Ranger Styles today.

Although Sessum's pre-trial statement after the walk through is consistent with the pre-trial statements of the other janitors after the walk through, Sessum's statement was false, as was his testimony at Petitioner's trial. Sessum testified that Gary Acreman talked to the girl as she approached the janitors seated on the stairs, followed her up the stairs on the way to the restroom, talked to the girl at the top of the stairs, and then grabbed the girl, accompanied by a man later identified as James Dexter Robinson, as the girl called: "No", "No", "Don't" and "Help". Clarence Lee Brandley didn't arrive on the scene until approximately five or ten minutes later and after the girl's calls for help were silenced.

In addition to being afraid of Ranger Styles, Sessum was also threatened by Gary Acreman. Acreman drove Sessum home from the high school on the day of the murder. While riding home, Acreman warned Sessum not to tell anyone that he had talked with the girl. Acreman also drove Sessum to the police station when Acreman and Sessum gave their statements and to the school for the walk through. On the way, Acreman again warned Sessum not to tell anyone that he had talked with the girl outside the restroom.

In March of 1987, a stranger assaulted Sessum as he was riding his bicycle home from work. The stranger inquired if he were John Sessum, then punched him, and then asked about the video taped statement Sessum had made which implicated Acreman in the death of Cheryl Fergeson. Sessum testified that he is still afraid of Acreman today.

Sessum was not called as a witness at Petitioner's second trial. District Attorney Keeshan elected not to call Sessum because he would not have been helpful to the State's case.

In the statement he gave two days after the murder, when he was alone and did not have the assistance of Gary Acreman, Sam Martinez stated that the victim had walked up the stairs and headed to the bathroom after Clarence Brandley had already come up the stairs. (The Court notes that at trial both Acreman and Martinez were consistent in their trial testimony that Clarence Brandley came up the stairs shortly after the girl had entered the restroom. The consistent testimony was certainly critical to the State's circumstantial case.) Although Sam Martinez

had given a sworn statement two days after the murder which was wholly at odds with the State's version of events proffered at trial, Martinez testified at the evidentiary hearing that he "got it straight" after Ranger Styles took him through the "walk through" accompanied by Gary Acreman and John Sessum. Martinez did not admit that Acreman had talked to the girl minutes before her murder until the evidentiary hearing.

6. The Court finds that the investigation in Petitioner's case had a "blind focus". The authorities wholly ignored any evidence, or leads to evidence, which might prove inconsistent with their premature conclusion that Petitioner had committed the crime. The conclusion is inescapable that the investigation was conducted not to solve the crime, but to convict the Petitioner.

For example, the authorities wholly ignored the lead provided by Cheryl Bradford that she had witnessed two white males hurriedly exit the gym area shortly after the victim was last seen alive.

The authorities also failed to take hair samples from the caucasion janitors present at the school on the day of the murder, even though the authorities knew, prior to the indictment of Clarence Brandley, that a caucasion pubic hair had been found near the victim's vagina. After defense counsel learned of this caucasion pubic hair, the district attorney succesfully resisted all efforts to have hair samples taken from Gary Acreman and the other white janitors.

The "blind focus" of the investigation is also apparent from the manner in which Ranger Wesley Styles wholly failed to investigate the information he had obtained from Henry "Ickie" Peace on the night of the walk through. The information provided by Peace indicated that Acreman may have begun to float a false story regarding the murder and may have known more about the murder than he had told Styles that afternoon when Styles had walked Acreman, Martinez and Sessum through the high school. Nonetheless, Ranger Styles never again interviewed Acreman or pursued Peace's information in any other manner. The Court finds that Styles failed to conduct a proper investigation in that the Ranger operated with the state of mind that he had already gotten his man, and that he was not going to investigate any leads that might prove his preconception wrong.

VI.

In his Sixth Claim for Relief, Petitioner alleges:

> TEXAS' DEATH PENALTY SYSTEM, AS APPLIED, DISCRIMINATES AGAINST BLACK DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The court notes that this claim is essentially the issue addressed by the Supreme Court in *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987). The *McCleskey* decision was decided on April 22, 1987: approximately six weeks prior to the Court of Appeals' June 30, 1987 order which granted Petitioner a full hearing on all issues, including Petitioner's *McCleskey* issue.

In *McCleskey v. Kemp*, the Supreme Court held that a defendant may not establish a constitutional violation solely through statistical evidence which establishes that blacks charged with the killing of a white have the far greatest likelihood of receiving the death penalty. Instead, the Supreme Court held that a defendant, in order to establish an Equal Protection Clause violation, must offer "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." 107 S.Ct. at 1766-67.

In accordance with the pleadings of the Petitioner and the June 30, 1987 order of the Court of Criminal Appeals, the Court allowed Petitioner to offer into evidence statistical evidence to establish that the probability of being executed in Texas is significantly enhanced when a black person is charged with killing a white victim. Consistent with the *McCleskey* decision, however, the court also afforded Petitioner an opportunity to introduce non satistical evidence establishing that racial considerations played a part in *his* case. Based on the testimony received and the credibility determinations regarding said testimony, the Court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him, and was an impermissible factor which significantly influenced the investigation, trial and post trial proceedings of Petitioner's case. Specifically, the Court makes the following Findings of Fact:

1. The Petitioner, Clarence Brandley, is a black man.

2. The victim, Cheryl Fergeson, was a 16 year old white girl.

3. Dr. Sheldon Ekland-Olson, testified at the evidentiary hearing as an expert witness. Dr. Ekland-Olson is a faculty member at the University of Texas at Austin. He holds a doctorate degree in Sociology and also attended Yale Law School.

Dr. Ekland-Olson conducted a research project which analyzed the application of the death penalty in Texas during the years 1974-1983, the first decade of the "new" Texas death penalty statute. Unlike the death penalty statutes in other states such as Florida and Georgia, the Texas statute is a "structured" or "guided discretion" statute, designed to eliminate the racial disparity in the application of the death penalty which the Supreme Court found offensive and unconstitutional in *Furman v. Georgia*.

Using data collected from the several hundred Texas capital convictions which occurred during the first decade of the post-*Furman* statute, Dr. Ekland-Olson sought to determine whether Texas' new guided discretion statute was in fact being applied in a non-discriminatory manner.

After accounting for the significant variables, Dr. Ekland-Olson's analysis of the data revealed that the Texas death penalty statute, as applied, has not produced non-discriminatory results. Significant race-linked discrimination exists in that capital cases involving white victims are more likely to precipitate the death penalty than cases involving black victims.

The research regarding rape homicides in Texas, the offense for which Petitioner was convicted, reveals that the most likely person to receive the death penalty in Texas is a black man convicted of the rape homicide of a white woman. Taking into account all of the various offenses eligible for the death penalty in Texas, and all of the many possible offender/victim racial combinations, the probability of being executed in Texas is increased five fold for a black man convicted of the rape homicide of a white woman.

The research of Dr. Sheldon Ekland-Olson, establishing that the Texas death penalty statute has produced victim-based racial discrimination, is consistent with the other research done in Texas and throughout the country, particularly the sophisticated Baldus study which the Supreme Court accepted as statistically valid in the *McCleskey* case.

4. The jury in Petitioner's first trial was all white. The State had used peremptory challenges to strike all qualified blacks.

5. The jury in Petitioner's second trial was all white. The State had used peremptory challenges to strike all qualified blacks.

6. At the time of Petitioner's first and second trials, the District Attorneys Office in Montgomery County utilized several prosecution manuals. The manuals were resource or reference books which instructed the prosecutors on all aspects of how to try a criminal case. The manual recommended that black persons not be allowed to serve on any criminal jury.

7. At the time of Petitioner's first and second trials, a routine or practice existed in the Montgomery County District Attorney's office that all black persons were to be stricken from the jury panel when there was a black defendant. Had any Assistant District Attorney allowed a black person to serve as a juror, the District Attorney, James Keeshan, would have required that assistant to explain why he departed from standard practice by allowing a black person to serve on a criminal jury.

8. No lawyer having practiced in Montgomery County can recall a black person ever being permitted to serve on a jury when there was a black defendant, except one instance in 1978 when a black Conroe police officer was allowed to serve on a jury.

9. The jury at Petitioner's first trial ultimately became deadlocked 11 to 1 for conviction. The lone holdout, William Shreck, failed to vote for conviction because he felt that the State had not proven Petitioner's guilt beyond a reasonable doubt. During the deliberations, the other jurors repeatedly called William Shreck a "Nigger lover". After a mistrial was declared, William Shreck received thousands and thousands of harassing phone calls. During the first month, the harassing calls would arrive every five seconds when the phone was left on the hook. On those occasions when the phone was answered, the caller would exclaim "nigger lover" and then hang up.

In April of 1987, six years after the mistrial was declared, William Shreck applied for the position of purchasing agent for Montgomery County. Of the seventy-odd applicants for the job, William Shreck was selected

as one of the several finalists. Mr. Shreck had considerable experience based on the thirty-odd years he was employed as a purchasing agent for an oil company in Houston. As a finalist, the five district judges and the county commissioner of Montgomery County interviewed William Shreck. During the 45 minute interview, approximately 35 minutes was consumed by the judge's questions regarding why Shreck did not vote for conviction at the first Brandley trial in 1980. Judge Keeshan asked many of the questions. The district judges than told William Shreck that his "not guilty" vote at the first trial demonstrated that he could not get along with people. The judges denied Mr. Shreck the job.

10. Shortly after the victim's body was found on August 23, 1980, a white Conroe police officer had a conversation with Henry Peace regarding who perpetrated the murder. The officer then turned towards Clarence Brandley and announced to Peace that "The nigger was elected".

11. Prior to Petitioner's first trial, Petitioner's attorneys approached the Sheriff of Montgomery County, Gene Reaves, to post Petitioner's bond. Bond had been set at Thirty Thousand ($30,000.00) Dollars and Petitioner's attorneys had good and sufficient surety to make the bond. The Sheriff refused to accept the bond, however, stating that "The little Nigger doesn't belong on the ground." District Attorney James Keeshan was present and agreed, echoing the Sheriff's phrase that the "little Nigger doesn't belong on the ground."

After both Sheriff Reaves and District Attorney Keeshan made their intentions clear that they didn't want the "little Nigger" to make bond, Keeshan met with Judge

Lee Alworth without any notice to defense counsel. Judge Alworth thereafter signed an ex parte order prepared by Keeshan which raised Petitioner's bond to Seventy Thousand ($70,000.00) Dollars.

12. Racial considerations infected the atmosphere within the courtroom during Petitioner's trial. Many members of the public, both black and white, attended Petitioner's trial. The Montgomery County Sheriff's Department treated the black spectators differently, however. When a black person exited the courtroom during trial, one of the numerous sheriff's deputies on hand would follow the black person from the courtroom and keep the person under observation. An elderly black gentleman, Reverend J. J. Robinson, pastor of the Mt. Hebron Baptist Church in Houston, was even followed by a deputy when he went to the restroom.

Several witnesses testified at the evidentiary hearing that a powerful feeling of prejudice and racial tension pervaded the courtroom. Judge Martin's secretary, Janet Dial, heard an elderly white woman openly repeat to herself in the courtroom, but plainly audible to others, "Kill the nigger, kill the nigger . . ." The sheriff's deputies allowed the woman to remain in the courtroom.

The Reverend Anderson Davis, a highly educated person in his middle 60's, testified that of the many trials that he has personally witnessed over the years in the States of Texas, Georgia, Virginia and Tennessee, on only one other occasion did he experience a trial where the racial tension in the courtroom compared to that of the Brandley trial. The trial was in Chattanooga, Tennessee in 1964 when a prosecution witness stated, without reproach from the court, that he knew three things about "niggers": They all lie, steal and smell.

The tone of the courtroom, as fostered by the District Attorney's Office, the Judge and the District Clerk's Office, was white against black. One example of this white against black atmosphere is evident in an in-chambers discussion during the penalty phase, where the district attorney complains to the trial judge that a black woman had sat on a white woman's hand. District Attorney Keeshan further reveals his personal white versus black posture when he suggests that if any announcements to the audience are necessary, he will make an announcement to the white people and Petitioner's attorney could make an announcement to the black people. Wholly apart from the judge's legal rulings, the demeanor and attitude of the judge was hostile to the Petitioner and the black members of the audience. The Reverend J. J. Robinson testified that the judge's attitude towards Petitioner and the black people in the audience clearly revealed the judge's partiality in the case. The Reverend did not feel comfortable even being in the courtroom.

13. During Petitioner's second trial, a "team-like" or "company" atmosphere existed at the courthouse between Judge Martin's staff, the District Attorney's Office and the District Clerk's Office. The "project" or "goal" of the team was to convict the Petitioner. Employees of Judge Martin's staff and the District Clerk's Office felt pressure to be team players and were too intimidated to act impartially towards Petitioner or to even voice any suggestion regarding Petitioner's possible innocence.

The "project-like" atmosphere pervaded the courthouse during Petitioner's second trial. The atmosphere existed even after the conviction, as evidenced by the agreement, between Judge Martin, the District Attorney and the Dis-

trict Clerk, to keep secret the fact that critical exhibits had become missing. A sordid instance where the "project like" mentality overbore any sense of justice and decency at the courthouse can be seen in the conduct of the District Clerk and the District Attorney when Attorney Don Brown began inquiring about the missing trial exhibits. When Don Brown informed District Clerk Peggy Stevens that he was going to ask District Attorney Keeshan about the missing exhibits, Peggy Stevens rushed to warn Keeshan at his office. Keeshan and Peggy Stevens then hid in the district attorney's office and laughed when Don Brown arrived and the District Attorney's secretary got rid of him. The "project-like" atmosphere culminated on November 22, 1985, when Judge John Martin, at the special request of District Clerk Peggy Stevens, set Petitioner's execution date for January 16, 1986—the District Clerk's birthday. (It should be noted that Judge Martin had no authority to even set Petitioner's execution date, let alone set the execution to coincide with the District Clerk's birthday celebration. Judge Martin had no authority because he had voluntarily recused himself from further handling of Petitioner's case in March, 1982, after defense counsel had confronted the Judge, on March 5, 1982, with the knowledge that the Judge had conducted ex parte meetings with the District Attorney regarding Petitioner's case.)

Based on the demeanor of Judge John Martin the two occasions that he testified, and the credibility determinations that the Court made regarding other witnesses at the evidentiary hearing, the Court finds that Judge Martin's testimony, perhaps tempered by a motive for self-preservation, was simply not credible.

VII.

When Texas Ranger Wesley Styles testified at the evidentiary hearing, he was in possession of a taped statement he had taken from Henry "Ickie" Peace on September 3, 1980. Because the existence of the statement had never been previously disclosed to Petitioner, Petitioner's counsel made an oral motion to amend their Second Application for Writ of Habeas Corpus. The oral amendment added a new claim for relief, as follows:

> PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BECAUSE THE STATE FAILED TO DISCLOSE, AND INTENTIONALLY SUPPRESSED, A STATEMENT OF HENRY "ICKIE" PEACE WHICH CONSTITUTED BOTH *GASKIN* AND *BRADY* MATERIAL.

The Court granted Petitioner's oral motion to amend and heard evidence on Petitioner's additional allegation. Based on the testimony received and the credibility determinations regarding said testimony, the Court concludes that the State intentionally failed to disclose the existence of the September 3, 1980 statement of Henry "Ickie" Peace, thereby denying Petitioner due process of law and a fair trial. Specifically, the Court makes the following Findings of Fact:

1. Henry "Ickie" Peace was the State's key witness at Petitioner's trial.

2. On September 3, 1980, Texas Ranger Wesley Styles, assisted by Charlie Ray, took a taped statement from Henry "Ickie" Peace. At the time of Petitioner's first and second trials, Charlie Ray was employed as an investigator for District Attorney James Keeshan. Charlie Ray is cur-

rently employed as an investigator for District Attorney Peter Speers, and sat at the State's counsel table during the evidentiary hearing.

3. Although the State produced other statements of Henry Peace at Petitioner's first and second trials, the State never informed defense counsel that the State possessed a statement from Henry Peace taken on September 3, 1980. Th State had a duty to disclose Peace's statement of September 3, 1980, just as the State had a duty to disclose the other statements of Peace which the State did in fact disclose.

4. Ranger Styles testified at the evidentiary hearing on October 7, 1987. Styles claimed that he had forgotten about the statement of Peace until "one week ago". Styles further claimed that he had "just happened to think about the tape" seven years after he had obtained the statement and thereafter proceeded to retrieve the tape from the attic in his home. Styles then gave the tape to the Montgomery County District Attorney's office on Thursday, September 17, 1987, or Friday, September 18, 1987. Upon receiving the tape, the District Attorney's office did not inform Petitioner's counsel. Nor did the District Attorney inform Petitioner's counsel when Henry "Ickie" Peace was called as Petitioner's first witness at the evidentiary hearing. Investigator Charlie Ray failed to testify at the evidentiary hearing.

5. Wesley Styles, pursuant to his duties as a law enforcement officer for the Texas Department of Public Safety, complied an offense report regarding his investigation in the Brandley case. Although Styles' report mentions all witnesses' statements that were taken during the investigation, the report fails to reveal that any statement

was taken from Henry "Ickie" Peace on September 3, 1980. Accordingly, Petitioner's counsel did not learn of Peace's statement when Ranger Styles produced his offense report at Petitioner's trial.

6. The Court finds that Wesley Styles' explanation regarding Peace's statement of September 3, 1980 was not credible and truthful. The Court finds that Wesley Styles and the Montgomery County District Attorney's Office intentionally failed to disclose the existence of the statement to defense counsel to deprive defense counsel of the opportunity to use the statement for cross-examination.

CONCLUSION

In the thirty years this Court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, witness intimidation, an investigation, the outcome of which was predetermined, and public officials who, for whatever motives, lost sight of what is right and just. The continued incarceration of Clarence Lee Brandley under these circumstances is an affront to the basic notions of fairness and justice.

The Court respectfully recommends that Clarence Lee Brandley be granted a new trial.

/s/ PERRY D. PICKETT
Perry D. Pickett
Judge Presiding